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In The

Supreme Court of the United States

October Term, 1972

No. 73-195

JOSEPH ZICARELLI,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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In The

Supreme Court of the United States

October Term, 1972

No.

JOSEPH ZICARELLI,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

Your petitioner, Joseph Zicarelli, respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division entered in the within matter on January 29, 1973, which judgment was denied review by the Supreme Court of New Jersey on May 2, 1973.

Citations to Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division, reported sub nom State v. Armellino, 122 N.J. Super. 225, 300 A.2d 154 (App. Div. 1973), is printed in Appendix B, infra (Pa2).

Jurisdiction

The judgment of the Supreme Court of New Jersey refusing to review the decision of the Superior Court, Appellate Division was entered on May 2, 1973 and is printed in Appendix B, infra (Pa24). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Does not the Sixth Amendment accord a state criminal defendant the right to trial by jury in the county in which the crime was committed?

2. Was not petitioner denied due process of law by the procedure wherein venue was allocated to a remote county upon the state's ex parte application and without any meaningful adversary proceeding thereafter being accorded to petitioner?

3. Was not the rule of Massiah v. United States, 377 U.S. 201 (1964), violated by the admission in evidence of a surreptitious tape recording of a conversation between petitioner and an informer made at a time when petitioner was already under indictment for different charges but

arising from the same investigation which led to the present indictment?

4. Was not petitioner denied his Sixth Amendment right to trial by an impartial jury as a result of the trial court's refusal to ask the jurors finally selected whether they had been exposed to any publicity concerning the case, where it was clear that there had been pervasive and prejudicial pre-trial publicity in the community concerning petitioner?

Statutory and Constitutional Provisions Involved

The constitutional provisions involved are the Sixth and Fourteenth Amendments to the United States Constitution. They are printed in Appendix A, infra (Pa1).

Statement

Petitioner Joseph Zicarelli was convicted after a jury trial in the Burlington County Court on seven counts of a fourteen count indictment returned by a statewide Grand Jury (37a-54a).[1] In the first count of the indictment he was charged with conspiring, along with John Armellino, Michael Armellino, Frank Mallamaci, William C. Fourgerel, Sr., William C. Fourgerel, Jr. and Ludwig (Ninni) Bruschi, to commit the following crimes: (1) that John Armellino, being the Mayor of West New

1. "a" references are to petitioner's appendix filed with the Superior Court, Appellate Division, and a part of the record below.

York, New Jersey would engage in misconduct in office in that he would use his office to keep safe from investigation, detection and prosecution an illegal gambling enterprise run by the other defendants, and (2) that Zicarelli, Mallamaci, Bruschi, and both Fourgerels would operate an illegal gambling enterprise. The conspiracy was alleged to have run from November 4, 1965 to April 8, 1970 in West New York (Hudson County), Hoboken (Hudson County) and elsewhere, and it was stated to be a part of the conspiracy that Zicarelli would pay and cause to be paid to John Armellino the sum of $1,000 per week.

Count 9 of the indictment charged Zicarelli, Mallamaci and Fourgerel, Sr. with aiding and abetting the payment of $1,000 to John Armellino on February 25, 1970 with the intent to induce Armellino to use his public office to keep the said gambling enterprise safe from investigation, etc., in violation of N.J.S. 2A:85-1 and 2A:85-14. Subsequent counts charged identical offenses on five other dates.

The indictment involved here (SGJ 2-70-8H) was one of a series of seven indictments returned by a State Grand Jury naming Zicarelli as a defendant. All seven (SGJ 2-69-2, SGJ 2-70-8A, 8B, 8C, 8D, 8E, 8H) charged offenses committed in Hudson County. One (SGJ 2-70-8A) also charged a conspiracy taking place in Bergen, Hudson and Burlington counties while another (SGJ 2-70-8B) charged a conspiracy in Mercer and Hudson counties.

With respect to Indictment SGJ 2-69-2 venue was initially allocated to Hudson County. This was necessary due to the fact that State Grand Jury Indictments are returned without a designation of venue which is thereupon fixed by the Assignment Judge. The allocation to Hudson County was by order of November 13, 1969. Subsequently, and without notice, the State petitioned the same court which had entered the initial order to change the venue to Mercer County (55a-57a). The main reason given in the petition was that additional indictments had been returned involving petitioner and those cases had been allocated to Mercer County. The petition also stated that a witness for the State in all of these cases was in protective custody and was required to be kept only in an area where the State could provide adequate security arrangements. The petition stated that such arrangements had been made in the Mercer County area (56a-21). On June 23, 1970, without notice and without a hearing, the court vacated its earlier order of November 13, 1969 and designated Mercer County as the county of venue for trial of Indictment SGJ 2-69-2 (58a).

With respect to five of the six indictments falling under SGJ 2-70-8A, et seq., venue was apparently fixed in Mercer County. Thereafter, and again without notice, the State petitioned the same court to reallocate all of these cases, including SGJ 2-69-2, to Burlington County (59a-61a). The thrust of this petition was that Zicarelli, a common defendant in all cases, was presently in custody in Burlington County, and that security requirements for the key witness

could be met in that county. That petition was presented on October 9, 1970 and, on that same date, the court, again without notice or hearing, ordered the venue changed to Burlington County (62a-63a). The last, and present, indictment, SGJ 2-70-8H, was returned after the other cases had been sent to Burlington County and its venue was placed there in the first instance (64a).

Petitioner moved to have the venue changed or redesignated to Hudson County. After argument (65a-110a), the Court delivered an oral opinion denying the motion (111a-123a). Leave to appeal was sought from, and denied by, the Appellate Division (127a). Further appeal, by way of certification, was then sought from the Supreme Court. Defendants' counsel were ordered to appear before the Supreme Court on March 9, 1971. Without argument, the Court on that date indicated that it was concerned with that portion of the trial judge's opinion wherein he had inferred that he was bound by the Assignment Judge's initial allocation of venue. As a result, the Court ordered counsel to go immediately to Assignment Judge Kingfield for a hearing. In accordance with this informal order, counsel did go to Judge Kingfield. Counsel agreed to give Judge Kingfield time to read the briefs already submitted and on March 12, 1971 he delivered an oral opinion denying the application (128a-143a).

On April 23, 1971 petitioner was sentenced to consecutive terms of 24-30 months in State Prison and a $1,000 fine on Counts 1, 9, 10, 11,

12 and 13. A similar sentence on Count 14 was ordered to run concurrently with the others, except for the fine, thus resulting in a total sentence of 12-15 years and a $7,000 fine. An appeal of his conviction to the Superior Court, Appellate Division resulted in an affirmance (Pa24).[2] A petition for certification to the Supreme Court of New Jersey was denied (Pa25.)

Zicarelli was convicted primarily upon the testimony of two witnesses, Peter Policastro and John Armellino.

Policastro was a former West New York police officer who had known Zicarelli for about 15 years. In 1957 he began to carry messages from Zicarelli to various politicians and police chiefs. Policastro testified that Zicarelli was the boss of gambling in Hudson County and took care of these public officials so that his gambling operation would go untouched by them. Beginning in 1968 Policastro began to carry money to Mayor John Armellino of West New York, Mayor Herman Kline of Guttenberg and John Beier Theurer, Hudson County Republican Chairman. He testified that he took $1,000 per week to Mayor Armellino, sometimes giving it directly to the Mayor and other times taking it to his brother, Michael Armellino. He would receive the money from either Zicarelli or Mallamaci.

In May of 1969 Policastro began to provide information about Zicarelli's activities to Detective

2. "Pa" references are to Appendices A and B to this petition.

Joseph Trainor of the New Jersey State Police. On several occasions between February and April of 1970 Policastro recorded conversations with a tape recorder concealed on his body. Only one of these recorded conversations was with Zicarelli, that being on February 20, 1970 when petitioner was a patient in St. Mary's Hospital, Hoboken. According to Policastro this conversation concerned, in part, the payments to Armellino. Other recorded conversations were with both Armellino and Mallamaci.

From early February 1970, with the exception of his confinement in St. Mary's Hospital, Zicarelli was not in Hudson County but was confined at Yardville and other places. Policastro testified that during this period he continued to make payments to Armellino with money obtained from Mallamaci. He stated that before leaving Zicarelli had told him that Mallamaci would run his operation if he were no longer in Hudson County. Indeed, Policastro never saw Zicarelli after he went to jail but Mallamaci told him that he was in touch with Zicarelli through one Nicholas Fluccari.

Michael Armellino testified that he had been receiving envelopes from Policastro for his brother John on a fairly regular basis since 1968. He understood that the envelopes contained money in connection with gambling. John Armellino, the Mayor of West New York during the time in question, admitted that he had received money from Zicarelli, through Policastro, for permitting gambling to go unchecked in West New York from 1965 to 1970.

Reasons for Granting the Writ

1. This case raises an important question not yet ruled upon by this Court; whether the Sixth Amendment guarantees trial by an impartial jury in the county where the crime shall have been committed. The Amendment speaks of "an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law...."

The constitutional requirement that the jury be from the State and district where the offense was committed was not accidental. Under the common law, it was generally held that the jury must be drawn from, and the defendant tried in, the county where the crime was committed. The following passage from Blackstone's Commentaries, Book 4, page 350 makes this clear:

> "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the County must return a panel of jurors, liberos et legales homines, de vicineto; that is, freeholders, without just exception, and of the visne or neighborhood; which is interpreted to be of the County where the fact is committed."

See also, R. von Moschzisher, The Historic Origin of Trial By Jury, 70 U. of Pa. L. Rev. 170 (1921). The reason given for the rule requiring a jury to be from the vicinage or district was that the accused should have the benefit of his own good character and standing with his neighbors, if

he had preserved them, and also of such knowledge as the jury might possess of the witnesses who might give evidence against him. Another reason sometimes given is that the provision insured a person charged with a crime from being transported to a distant site for trial, where he could not have the benefit of the presence of his witnesses and of having their statements weighed by jurors who were generally acquainted with them. State v. Johnston, 456 P.2d 805, 808 (Haw. Sup. Ct. 1969); United States v. Johnson, 323 U.S. 273, 275-276 (1944).

Jury trials, with a vicinage requisite, came to this country with the English colonists. An indication of this is found in the resolve of October 14, 1774 of The First Continental Congress. The Congress, objecting to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies, declared:

> "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." R. Perry, ed., Sources of Our Liberties at 288 (1959).

See also United States v. Bink, 74 F. Supp. 603, 612 (D.C. Ore. 1947).

In Duncan v. Louisiana, 391 U.S. 145 (1968), rehearing denied, 392 U.S. 947 (1968), in holding the Sixth Amendment's jury trial guarantee applicable to the States through the Fourteenth

Amendment, this Court emphasized an accused's right to trial "by a jury of his peers", and the "insistence upon community participation in the determination of guilt or innocence" reflected in the Amendment. Implicit in these phrases is an underlying recognition that the constitutional provision safeguards an accused's right to a jury trial in the locale where the crime was committed. Thus, in the context of the Amendment "district" would mean "county" if that were the governmental subdivision within the State.

Only one lower court has discussed this question, resolving it adversely to the position advanced by petitioner herein. State of Maryland v. Brown, 295 F. Supp. 63 (D.C.D. Md. 1969). The Appellate Division in this case gave short shrift to this contention merely relying upon Brown as authority to the contrary (Pa13).

Petitioner was placed on trial in remote, rural Burlington County, far removed from the urban Hudson County locale of the crimes charged. If his contention is correct he was denied a valuable, fundamental constitutional right. This court should grant certiorari to consider this important, hitherto unresolved, issue concerning the meaning of the Sixth Amendment.

2. The allocation of venue to Burlington County without an adversary hearing in the first instance denied petitioner his right to due process of law as guaranteed by the Fourteenth Amendment. The Appellate Division held that the belated hearing before Judge Kingfield cured any deficiency in this regard (Pa14), but this was clearly in-

correct. The hearing before Judge Kingfield was long after the event and only three days before a fixed, peremptory trial date in Burlington County. Furthermore, the belated hearing unfairly placed petitioner in the posture of a moving party seeking to upset a ruling already made by two judges, when in truth the burden should have been upon the State to sustain its petition for change of venue.

As this Court said in Goldberg v. Kelly, 397 U.S. 254, 267-268 (1970), a hearing which affects important rights must be at a meaningful time and in a meaningful manner. Here where petitioner learned, after the fact, that he had been thrust into an alien environment for trial of the criminal charges against him, the conclusion that standards of due process have not been observed is most compelling.

3. A key item of evidence in this case was a tape recording made by the witness Policastro of a conversation he had with petitioner on February 20, 1970. At that time petitioner was already under indictment in another, albeit unrelated, matter which had come to light during the course of the same investigation which led to the instant charge. An indictment charging petitioner with conspiracy to murder (1a-2a) was returned on November 13, 1969 and he had been arraigned and bailed on that charge, on which he was represented by counsel, well before February 20, 1970.

Accordingly, the recording in question was inadmissible under Massiah v. United States, 377 U.S. 201 (1964), made applicable to the states by Lyles v. Beto, 379 U.S. 648 (1965). Massiah commands "an absolute right to counsel after indictment, thereby vitiating the validity of all oral communications between the defendant and the police made in the absence of counsel" United States ex rel O'Connor v. New Jersey, 405 F.2d 632, 636 (3d Cir. 1969). It has likewise been held that "such statements are inadmissible whether they are taken by the police or by an informant working as an agent of the police, regardless of the voluntariness of the statement." United States ex rel, Milani v. Pate, 425 F.2d 6, 7 (7th Cir. 1970).

The sole distinguishing feature herein is that the recording was not offered as evidence at the trial of the indictment returned prior to February 20 but, rather, on one returned subsequently. However, if the right to counsel enunciated in Massiah is to retain vitality, then it should surely apply to this case where the indictment previously returned was part of the same investigation by the very same authorities who caused the informant to conduct the February 20 interview and record it secretly.

4. On the second day of jury selection in this case there came a point when defense counsel indicated that he was tentatively satisfied with the jury as then constituted. However, before giving final assent to the composition of the jury, counsel asked the court to direct a single but crucial question to those jurors then in the box concerning

whether they had been exposed to any publicity concerning this case (2T69-8 to 70-3).[3] This request was opposed by the State (2T70-15 to 71-9), and, after further argument (2T71-10 to 74-11), was denied by the court (2T74-12 to 13). At the conclusion of the day's proceedings counsel renewed this request (2T128-13 to T134-12) and finally accepted the jury "with prejudice" or subject to the objection (2T134-13 to 22). The matter was again raised briefly the following day when one of the jurors already sworn was excused by the court (3T8-25 to 11-17), but the court once again declined to alter its position (3T11-18 to 24).

There could be no doubt that the trial of this case generated a great deal of virulent publicity and that numerous jurors were exposed to it and excused as a result. Of the jurors who finally deliberated on this case five came from a reserve panel called on the second day of jury selection. Of these jurors only one was questioned about exposure to pre-trial publicity, albeit while the other members of the panel were seated in the courtroom.

In refusing to question the final group of jurors in the box about exposure to pre-trial publicity, the trial judge said, in part:

> "I am of the conclusion that we are not here dealing with the question about whether or not anyone has read, heard or seen anything relating to this case. The question

3. "T" references are to the trial transcript which constituted part of the record below.

is whether or not they are in a position, whether or not they can distinguish that which they have seen, heard or read, and made an independent judgment based upon the facts as they evolve in this case, and apply the law" (2T71-10 to 18).

It is evident that the test to which the court referred was correct insofar as challenge for cause was concerned. However, counsel made it quite clear that he desired the questioning as a basis for the intelligent and informed exercise of his peremptory challenges (2T72-12 to 73-22). There can be no doubt that the voir dire was developed for that purpose as well. The impairment of the defendant's right to full and intelligent use of his peremptory challenges in the present case is rendered all the more serious since the proposed line of inquiry concerned the juror's exposure to pre-trial publicity. Where such publicity exists the court conducting a voir dire takes on an added burden. See United States v. Kahaner, 204 F. Supp. 921, 924 (S.D.N.Y. 1962).

The Appellate Division held that the inquiry to Juror Cline concerning publicity in the presence of the reserve panel constituted an adequate voir dire on this subject. In so ruling the court ran counter to those better reasoned authorities which require, in cases where there is extensive pre-trial publicity, that each juror be questioned separately on this subject. Patriarca v. United States, 402 F.2d 314, 318 (1 Cir. 1968); Silverthorne v. United States, 400 F.2d 627, 637 (9 Cir. 1968); ABA, Standards Relating to Fair Trial and Free Press, (Tent. Draft. Dec. 1966), Section

3.4 pp. 103-137. Here, not only was each final juror not questioned individually but the court refused to even inquire of them directly as a group on this vital subject. In upholding this inadequate questioning the Appellate Division has seriously diluted defendant's right to trial by an impartial jury. See Ham v. South Carolina, ___U.S. ___, 35 L. Ed.2d 46 (1973).

Conclusion

Wherefore, for the reasons set forth herein, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Michael A. Querques
Attorney for Petitioner

Appendix A

Constitutional Provisions Involved
United States Constitution

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."

Amendment XIV: "1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, not deny to any person within its jurisdiction the equal protection of the laws."

* * * *

Appendix B

Opinion of the Appellate Division

(Filed January 29, 1973)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2302-70
A-2303-70
A-1607-70
A-1796-70

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

JOHN ARMELLINO, MICHAEL ARMELLINO, JOSEPH ZICARELLI, FRANK MALLAMACI, WILLIAM C. FOURGEREL, SR., WILLIAM C. FOURGEREL, JR. and LUDWIG BRUSCHI a/k/a NINNI,

Defendants-Appellants.

Argued: September 25, 1972 — Decided: January 29, 1973

Before Judges Fritz, Lynch and Barrett.

On appeal from the Burlington County Court.

Mr. Michael A. Querques argued the cause for appellant Joseph Zicarelli (Messrs. Isles & Weissbard, attorneys).

Mr. I. Mark Cohen, Assistant Deputy Public Defender, argued the cause for appellant Frank Mallamaci (Mr. Stanley C. Van Ness, Public Defender, attorney).

Mr. Elmer J. Herrmann argued the cause for appellant William C. Fourgerel, Jr. (Messrs. Herrmann and Blasi, attorneys).

Mr. John P. Russell argued the cause for appellant Ludwig Bruschi.

Mr. Michael R. Perle, Deputy Attorney General, argued the cause for respondent (Mr. George F. Kugler, Attorney General, attorney).

The opinion of the court was delivered by LYNCH, J.A.D.

Defendants Joseph Zicarelli, Frank Mallamaci, William Fourgerel, Jr., William Fourgerel, Sr. and Ludwig Bruschi, a/k/a Ninni, were charged in a 14 count State Grand Jury indictment with conspiracy to corrupt Mayor John Armellino of West New York, Hudson County, New Jersey, to the end that an illegal gambling enterprise being conducted by the said defendants would be kept free of prosecution. Also indicted and charged as participants in the same conspiracy were the defendants John Armellino and his brother Michael Armellino.

Opinion

The indictment charged that Zicarelli, Mallamaci, both Fourgerels and Bruschi operated an illegal gambling enterprise consisting of lottery and bookmaking between November 1965 and April 1970. In addition, John Armellino was indicted for misconduct in office in failing to enforce the criminal laws of the State, and in using his office to keep safe from investigation and prosecution the gambling enterprise being conducted by the defendants Zicarelli, Mallamaci, the Fourgerels and Bruschi. The Armellinos were also indicted for having received bribes for their said misconduct, and Zicarelli, Mallamaci and Fourgerel, Sr. were indicted for corruptly aiding, abetting and causing the payment of the bribes.

Michael and John Armellino pleaded guilty to the conspiracy counts and their cases were severed for trial. Both testified on behalf of the State.

Defendants Zicarelli, Mallamaci, Fourgerel, Sr., Fourgerel, Jr. and Bruschi were convicted and received various sentences to State Prison and fines, together with an assessment against Zicarelli and Mallamaci of one-fifth of the trial costs against each. This appeal followed.

The contentions of defendants may be summarized as follows: 1) that the venue was improperly laid in Burlington County; 2) that the court erred in allegedly refusing to ask the jurors finally selected whether they had been exposed to any publicity concerning the case; 3) that the court erred in permitting the recording of several conversations between one Policastro

and several of the defendants to be received in evidence and in allowing the jury to use a State prepared transcript of the recordings as a listening aid; 4) that defendants' motion for judgment of acquittal should have been granted; 5) that the court erred in its charge to the jury; 6) defendant Zicarelli contends that the court erred in permitting testimony that he was in custody during part of the time covered by the indictment; 7) the court erred in permitting the State to proceed with its proofs that one Fluccari was a co-conspirator and in permitting the State to adduce testimony that Fluccari could not be found; 8) the court erred in permitting a State Trooper to testify concerning the structure of a lottery organization and permitting a chart depicting the same to be received in evidence; 9) Zicarelli contends that the court erred in sustaining numerous objections made by the Prosecutor during the summation of Zicarelli's attorney; 10) defendants Zicarelli and Mallamaci contend that the sentences imposed upon them were illegal insofar as they included an assessment against each of them of one-fifth of the costs of trial, and 11) defendant Mallamaci contends that the sentence imposed upon him was excessive and should be reduced.

Defendants Fourgerel, Jr. and Bruschi join in the contentions made by Zicarelli and Mallamaci as to Points 1, 3 and 4. Fourgerel, Sr. did not appeal. [1]

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1. Since the contentions of all appellants are encompassed in those raised by appellant Zicarelli (except as to Mallamaci's sentence), disposition of his contentions will be deemed to be dispositive of the contentions of all appellants.

Opinion

A

Venue

The indictment here involved (SGJ 2-70-8H) was one of a series of seven indictments which were returned by the State grand jury (selected pursuant to N.J.S.A. 2A:73A-1 et seq.) and in all of which Joseph Zicarelli was a named defendant. All seven charged offenses committed in Hudson County. One (SGJ 2-70-8A) also charged a conspiracy taking place in Bergen, Hudson and Burlington Counties, and one (SGJ 2-70-8B) charged a conspiracy said to have occurred in Mercer and Hudson Counties, and elsewhere.

The venue of the within indictment, the last of the seven to be returned, was laid in Burlington County by Judge Kingfield, the assignment judge designated by the Chief Justice to administer State grand jury proceedings as provided in the State Grand Jury Act (N.J.S.A. 2A:73A-2).

Defendants' first contention is that the trial court erred in denying their motion for change of venue to Hudson County. The argument is that: 1) R.3:14-1 requires that an offense shall be prosecuted in the county where it was committed, 2) the Sixth Amendment to the United States Constitution guarantees an accused the right to trial by an impartial jury in the county wherein the crime has been committed, 3) the allocation of venue to Burlington County, without an adversary hearing in the first instance, denied defendants due process of law.

Opinion

Of the seven indictments, the venue of the first (SGJ 2-69-2) was initially laid in Hudson County. Venue on the next five was initially laid in Mercer County (SGJ 2-70-8A, 8B, 8C, 8D and 8E). The Attorney General filed a petition with Judge Kingfield seeking to have the first indictment (SGJ 2-69-2) changed from Hudson to Mercer County where the other five had been allocated. Without notice to defendants an order was entered effecting the change of venue to Mercer County. However, on October 9, 1970, the Attorney General filed another petition seeking to transfer the six indictments (the instant indictment had not yet been returned), to Burlington County. The grounds asserted were that defendant Zicarelli was incarcerated in Burlington County, the prosecution required protection of its principal witness (Peter Policastro), whose personal safety was in danger for which security arrangements could adequately be made in Burlington County, and that all cases involved common questions of law and fact to be best disposed of by a single judge. Again, without notice to defendants, the court entered an order reallocating the indictments to Burlington County.

Shortly thereafter, the subject indictment (SGJ 2-70-8H) was returned and Judge Kingfield designated Burlington County as the venue for trial.

On January 8, 1971, all defendants moved before Judge Van Sciver, to whom the cases had been assigned for trial, for an order to reallocate venue to Hudson County. The motion was denied. However, the Supreme Court remanded the matter to Judge Kingfield to decide the question of venue

anew, in order to give defendants an opportunity to oppose the State's petition, an opportunity which they had not been afforded on the original allocation to Burlington County.

After a hearing, Judge Kingfield decided that Burlington County was the proper county for venue. He stated his reasons: 1) "somewhat a matter of convenience"; 2) the availability of a judge and a courtroom in Burlington County; 3) the State Grand Jury Act (N.J.S.A. 2A:73A-3) created a district which embodies the entire State and the Act authorized the designated assignment judge to allocate the venue of trial; 4) in adopting R.3:14-1 the Supreme Court did not contemplate the State grand jury and the rule was not intended to apply to it; 5) the security of the State witness Policastro, an "important factor," could be maintained better in Burlington County; 6) the Sixth Amendment to the United States Constitution did not stand in the way of Burlington County venue; 7) there would be less publicity there than in Hudson; and 8) there would be an impartial jury which would give defendants a fair trial and defendants would suffer no prejudice by Burlington County venue.

R.3:14-1

This is the venue rule normally applicable to county grand juries and would, with certain exceptions not applicable here, require trial in the county where the offense was committed.

Opinion

The State Grand Jury Act (N.J.S.A. 2A:73A-3) contemplates a grand jury quite unlike the traditional county grand juries. Its powers are set forth in N.J.S.A. 2A:73-3:

> A State grand jury shall have the same powers and duties and shall function in the same manner as a county grand jury established pursuant to Title 2A of the New Jersey Statutes except that its jurisdiction shall extend throughout the State. The law applicable to county grand juries shall apply to State grand juries except insofar as they are inconsistent with this Act. The Supreme Court may promulgate such rules and regulations as it deems necessary to govern particularly the procedures of State grand juries. [Emphasis added].

The Act has also dealt with the problem of venue in the following manner:

> Any indictment or presentation by a State grand jury shall be returned to the assignment judge without designation of venue. Thereupon, the judge shall, by order, designate the county of venue for the purpose of trial ***. [N.J.S.A. 2A:73A-81; emphasis added].

There is no doubt that one of the purposes of the State Grand Jury Act was that it was to be unfettered by the limitations of a county grand jury. To that end, it was given State-wide jurisdiction and venue was to be directed by the assignment judge designated by the Chief Justice.

Venue is not a matter of jurisdiction, nor is it of constitutional dimension. State v. Di Paolo, 34 N.J. 279, cert. denied 368 U.S. 880 (1961). It must not bow to circumstances which no longer exist. In Di Paolo, the Court said:

> *** Although a rule developed at early common law that a prosecution be instituted in the county in which the crime was committed, the reasons seem unrelated to the stated aim of the guarantee. Rather the rule reflected a practice made necessary by circumstances which no longer exist. Communities were scattered and travel difficult. Petit jurors decided causes upon their personal knowledge rather than upon the testimony of witnesses and probably grand jurors as well relied upon what they knew or learned from their neighbors. That the concept of venue was not thought to be an essential attribute of the procedural guarantee is evidenced by the fact that when changing circumstances made the then concept of venue a fortuitous haven for the guilty, Parliament enacted numerous exceptions to the common law rule and did so long before the separation of the American colonies. [34 N.J. at 285-286; emphasis added].

And, again demonstrating the subservience of venue concepts to legislative purposes and accommodation to changing needs, the Supreme Court said in Di Paolo:

Thus at the time of the adoption of the American constitutions the common law rule of venue had already been modified by legislation designed to meet situations for which the general rule was inadequate or inept. Moreover, the nature of the subject suggests that room must be left for accommodation with changing needs, ***.

* * *

This conclusion is fortified by the fact that our Legislature has dealt with the subject of venue without, so far as we know, any question as to its constitutional authority to do so. See State v. Wyckoff, supra (31 N.J.L. at p. 69); State v. James, 96 N.J.L. 132, 148 (E. & A. 1921); R.S. 2:184-1 to 6; L. 1944, § 1, p. 715, N.J.S.A. 2:184-2.1. [Emphasis added].

R. 3:14-1 was adopted when there were only ounty grand juries. Necessarily then, only such ıries were contemplated in the adoption of the Rule. 'he State grand jury, on the other hand, was cre- ted because of the need to investigate and prosecute rime without regard to county boundaries. It was remised on the notion that the institution of the tate grand jury can cope with the problems of ıodern law enforcement only if it be relieved f outmoded concepts of jurisdiction and vicinage vhich too often have imposed an artificial re- traint on grand jury probes and a particular bur- en upon inquiries into syndicated criminal activi- es. Statement of Governor Hughes, signing S.

654, December 16, 1968. It is a new weapon, or agency, created by the Legislature to enforce the criminal law, just as creation of a new police force would be such an instrument. In that instance it could not be said that creation of the State Police was merely a matter of procedure committed solely to the courts (cf. Winberry v. Salisbury, 5 N.J. 240 (1950)), but rather a matter of substance created by the Legislature to aid the executive arm of the government in enforcement of the law. The power of the designated assignment judge to allocate venue is a reasonable implementation of that agency to serve the end ordained by the Legislature. Thus, the question of venue under the State Grand Jury Act is not, by use of the "broad brush," to be brought within the purely "procedural" framework of Winberry v. Salisbury, supra.

The Chief Justice of our Supreme Court accepted his responsibility under the State Grand Jury Act and designated Judge Kingfield as the assignment judge thereunder. In doing so he clothed that Judge with the authority as provided by N.J.S.A. 2A:73A-2, to designate the county of venue. Implicitly, he recognized that R.3:14-1 was here inapplicable. We so hold. If it be assumed, as defendants argue here, that venue is solely for the Supreme Court's direction and within its control, the answer must be the same. It must be presumed that the court was well aware of the venue provision of the State Grand Jury Act, as well, of course, of its own R.3:14-1. The court's failure to amend that rule to cover indictments returned by a State Grand Jury be-

speaks an intent on the part of the court that the venue provisions of the statute (i.e., that venue was to be allocated by the assignment judge designated by the Chief Justice), were acceptable to the court and were not contrary to its intent.

In any event, under R.1:1-2, Judge Kingfield could have relaxed R.3:14-1 in assigning venue to Burlington County. In exercising our original jurisdiction under R.2:10-5, we do so. There is no prejudicial error in the action of the court below.

The Sixth Amendment to the United States Constitution

The Sixth Amendment provides in part that:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district have been previously ascertained by law***.

Defendants equate "district" as therein provided to "county." Such argument is not only a semantic distortion of the language of the amendment (which does not mention "county"), but is totally illogical. And so it was rejected in State of Maryland v. Brown, 295 F. Supp. 63, 82 (D. Md. 1969). There the court said:

It is also obvious that the words "district" and "county" were not used synonymously in the three provisions. The word "county" was used in section 29 of the first Judiciary Act. The words "State and district" were used in the Sixth Amendment. A reading of the tests of that constitutional Amendment and of that statute makes it clear that "district" was not meant to connote "county," or vice versa.

Due process of law

Defendants argue that they were denied due process of law when, without a hearing, Judge Kingfield first designated Burlington County as the venue herein. However, after remand from the Supreme Court, Judge Kingfield gave defendants full opportunity to be heard and thereupon settled the venue in Burlington. Therefore defendants suffered no prejudice in the original ex parte proceeding in allocating venue, nor can it be said that due process was denied.

B

The voir dire examination of the jury panel

Defendants contend that the court did not adequately inquire of the jury finally selected as to whether they had been exposed to publicity concerning this case.

Approximately 121 jurors were questioned by the judge before the final jury was selected. Of those, 15 were excused by the court because of exposure to pretrial publicity and that therefore they could not be impartial. Ninety-two others were excused for various reasons or on peremptory challenge.

There is no dispute that there was adequate inquiry made of the initial jury panel. The complaint is that members of the reserve panel were not sufficiently interrogated on this subject. We disagree.

When the reserve panel was brought into the courtroom on the second trial day, the judge told them that the intent of his questioning was to determine whether any reason existed why they could not be impartial. Juror Cline was the first person drawn from the reserve panel. The judge inquired of Cline in the presence of the reserve panel:

> Having in mind that we readily admit that none of us live or operate in a vacuum, that we are all exposed to circumstances and media about us, and having in mind also that there may well have appeared in various of the press media certain articles that relate in some fashion to the trial of this case or the personalities involved, is there any experience that you have had with regard to reading, hearing or discussing the merits of this case or expressing our [sic] opinion with respect to the merits of this case?

Later two prospective jurors were excused specifically because of exposure to pretrial publicity.

We find that the trial court adequately inquired of all jurors as to exposure to pretrial publicity.

C

The Tapes

(1)
Their alleged inaudibility

Defendants contend that the trial court erred in admitting into evidence certain taped conversations between the State's principal witness, Peter Policastro, and others, including defendant Zicarelli.

Policastro had been a member of the West New York Police Department for 18 years and had attained the rank of Detective Sergeant. After retiring on a disability pension he was engaged in private detective work, but was not successful. He had known defendant Zicarelli for 15 years and, during his police service, had carried messages from Zicarelli to various politicians and police chiefs. Policastro was well familiar with the gambling business in Hudson County. In fact he had acted as a courier for Zicarelli in carrying "pay-offs" to certain public officials.

However, in 1969, Policastro's attitude changed. After meeting with State Police Detective Trainor, he began exchanging information with him and ultimately agreed to become a witness for the State in this case. Policastro suggested that a tape recorder be placed upon his person to tape conversations. After being instructed concerning the use of the equipment he was outfitted with the recorder. There followed several conversations between Policastro and Zicarelli, Michael and John Armellino, Mallamaci and Fluccari. The conversations were taped and transcripts thereof were made with the aid of Policastro, State Trooper Herbert and a stenographer. The tapes were played at the trial and the transcripts were used by the jury as a listening aid.

The only tape, admission of which deserves comment, is that between Policastro and defendant Zicarelli on February 20, 1970, while Zicarelli was confined to St. Mary's Hospital in Hoboken, New Jersey. The main thrust of defendant Zicarelli's argument is that the tape is largely inaudible and unintelligible and therefore should have been excluded, citing State v. Driver, 38 N.J. 255 (1962).

This court listened to that tape and we agree that a substantial part is inaudible. However, the transcript of the tape correctly indicates the portions which were audible and those which were not. Cf. United States v. Hall, 342 F.2d 849 (4th Cir. 1965), cert. denied 382 U.S. 812 (1965), to the effect that use of a transcript is of assistance to jurors and is within the province of the trial judge's discretion.

It is true that in State v. Driver, it was suggested that the tape there involved was so inaudible and garbled that, as a matter of discretion, it should have been excluded.

In reviewing the exercise of discretion here, we consider the evidential purpose which the tape served. It has been held that if a tape is partially intelligible and has a probative value, it is admissible even though substantial portions thereof are inaudible. State v. Spica, 389 S.W.2d 35, 48 (Mo. Sup. Ct. 1965), cert. denied 383 U.S. 972 (1966); United States v. Hall, supra; Addison v. United States, 317 F.2d 808, 815 (5th Cir. 1963), cert. denied 376 U.S. 905 (1964).

Certainly the tape of the conversation between Policastro and Zicarelli at St. Mary's Hospital on February 20, 1970, proved the intimacy between them and, considered with Policastro's direct testimony, the relationship of that intimacy to the central conspiracy of suppressing prosecution of the gambling enterprise headed by Zicarelli. Therefore, it had probative value to that extent, and was admissible for that purpose. In Driver, on the other hand, the only relevance of the tape was that it was a confession. It had no other probative value. In that case the inaudibility of the tape was central to the purpose for which it was offered and, because it was largely inaudible (in addition to its involuntary nature), it would have been grossly unfair to admit it. As said above, the Policastro-Zicarelli tape had probative value for reasons other than what was said. Inaudibility had no relevance to those rea-

sons. The question of admissibility of the tape was a matter of discretion. Cf. State v. Driver, supra, 38 N.J. at 288. Here there was no abuse of discretion in its admission.

In any event, there was no prejudice to defendants in the introduction of the tapes or the transcript thereof. Policastro testified that everything therein was truly said. He was subjected to cross-examination. See People v. Jackson, 125 Cal. App. 2d 776, 271 P.2d 196, 199 (Dist. Ct.App. 1954). In turn, the tapes served the probative purpose of corroborating Policastro's testimony. The resolution of the weight of that evidence was left to the jury.

We therefore find no error in the admission of the tapes or transcript thereof.

(2)
Reference to other crimes

We hold that reference on the tapes to other crimes were admissible under the exception to R. Ev. 55.

In State v. Kociolek, 23 N.J. 400 (1957), the court lists a number of exceptions to the general rule that, upon the trial of a person for one crime, evidence that he has committed other crimes is irrelevant. Such exceptions include: (1) when the circumstance of the crime charged and those of the extraneous crime indicate that they were both committed by the same person; (2) when the accused's perpetration of an extraneous crime

shows that he had the opportunity of committing the crime in issue; (3) when the several crimes may have sprung from a single motive, aiming at the accomplishment of the same end; and (4) whenever defendant's guilt of an extraneous crime tends to logically prove some particular element of the crime for which he is being tried. See State v. Kociolek, supra at 419. All of the above instances are fairly applicable to the instant case. See also State v. Mulero, 51 N.J. 224, 228 (1968); State v. Baldwin, 47 N.J. 379 (1966), cert. denied 385 U.S. 980 (1966).

Furthermore, it has been held that where a series of crimes are committed for the accomplishment of a single purpose, and that purpose is manifestly the sole cause of the commission of the crime alleged, proof of the separate crimes is competent evidence. State v. Fay, 127 N.J.L. 77, 83 (Sup. Ct. 1941). In Fay, it was said:

> Where a series of crimes are committed for the accomplishment of a single ultimate purpose, and that purpose is manifestly the sole inducing cause of the commission of each separate crime, the rule applied in the case just cited makes proof of these separate crimes competent evidence. State v. Landecker, 100 N.J.L. 195, 198; 126 Atl. Rep. 408, affirmed, 103 N.J.L. 716; 137 Atl. Rep. 919 [at 83].

Finally, as specifically sanctioned by R. Ev. 55, evidence of other crimes may be saved from exclusion where it tends, as here, to demonstrate motive, intent, plan, or knowledge.

Therefore, defendant Zicarelli's argument must fail and the evidence is admissible. The "other crimes" here, i.e., corruption of other officials by Zicarelli, were accomplished for a similar purpose — protection of Zicarelli's gambling enterprise. See also State v. Boiardo, 111 N.J. Super. 219 (App. Div. 1970), certif. denied 57 N.J. 130, cert. 401 U.S. 948 (1971).

D

Other contentions of defendant Zicarelli

Defendant Zicarelli also makes the following contentions:

> Point IV. The defendant's motion for judgment of acquittal should have been granted as to the substantive counts.
>
> Point V. The court erred in its charge...
>
> A. The court erred in charging the jury on the substantive counts with respect to an offer of undue reward where such was contrary to the State's theory and there was no evidence concerning same.

B. The court's charge on aiding and abetting was erroneous and confusing.

C. The court erred in its charge on conspiracy.

D. The court erred in refusing to charge that a party vouches for the credibility of its own witnesses.

Point VI. The court erred in permitting testimony that Zicarelli was in custody during part of the time covered by the indictment.

Point VII. The court erred in permitting the State to proceed with its proofs on the basis that Fluccari was a co-conspirator.

Point VIII. The court erred in permitting the State to adduce testimony that Fluccari could not be found.

Point IX. The court erred in permitting Herbert's testimony concerning the structure of a lottery organization and in allowing his chart depicting same to be received in evidence.

Point X. The court erred in sustaining numerous objections made during the summation of Zicarelli's attorney.

We find no merit in any of these contentions.

Opinion

E

Mallamaci's sentences

Defendant Mallamaci contends that, since he was sentenced to consecutive terms of 20 to 22 months on Count I (conspiracy) and Counts IX, X, XI and XIII and a similar but concurrent sentence on Count XIV (substantive offenses), the sentences were excessive. He contends that, in total, the substantive several offenses constituted "a single course of conduct arising out of the conspiracy to commit those crimes and as a result he should not serve a consecutive sentence on each of those counts."

Not so. As said in State v. Cox, 101 N.J. Super. 470, 475 (App. Div. 1968), cert. denied 53 N.J. 510 (1969):

> Here we are unable to agree with defendant's contention that the five offenses of which he was found guilty comprised a single continuous transaction. *** These represent a sequence of separate events, deliberately undertaken in succession, rather than a single episode.

F

Assessment of costs

The court below erred in assessing the costs of prosecution against defendants Zicarelli and Mallamaci. State v. Mulvaney, 61 N.J. 202 (1972). The order to that effect is reversed.

Conclusion

Except as to the assessment of costs as to defendants Zicarelli and Mallamaci, the judgments of conviction are affirmed.

(stamped) A TRUE COPY
Mortimer G. Newman Jr.
Clerk

Order of the Supreme Court

(Filed May 2, 1973)

SUPREME COURT OF NEW JERSEY
C-383 SEPTEMBER TERM 1972

State of New Jersey,

Plaintiff-Respondent,

vs.

Joseph Zicarelli,

Defendant-Petitioner.

To Appellate Division, Superior:

A petition for certification having been submitted to this Court, and the Court having considered the same,

Order

It is hereupon Ordered that the petition for certification is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 2nd day of May, 1973.

s/ Florence R. Peskoe
Acting Clerk

FILE COPY

FILED
JUL 27 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-195

JOSEPH ZICARELLI,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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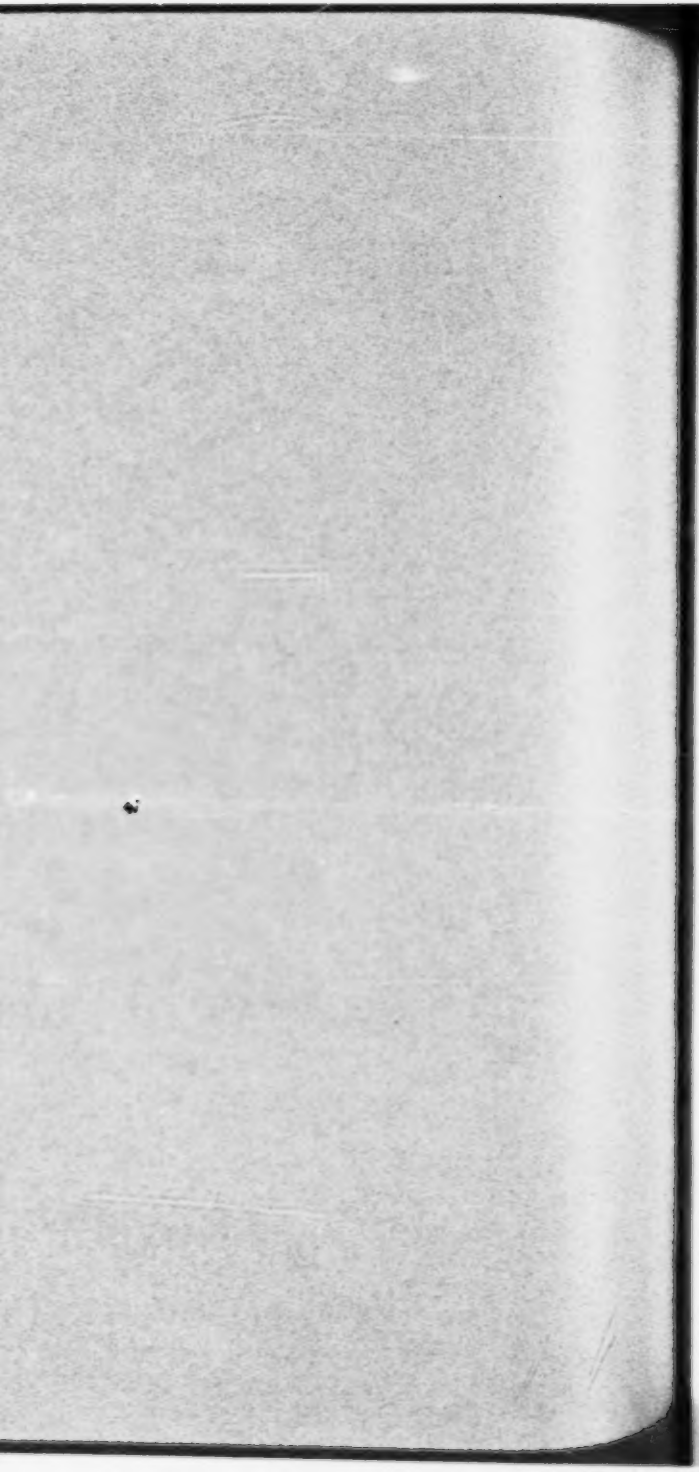

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UNITED STATES CONSTITUTION CITED

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1972

Docket No.

JOSEPH ZICARELLI,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Your respondent respectfully urges denial of the writ of certiorari to review the judgment of the Superior Court of New Jersey, Appellate Division, entered in the within matter on January 29, 1973, as sought by petitioner.

COUNTER STATEMENT OF THE CASE

For purposes of the Court's consideration of the petition, respondent accepts the "Statement" (pp. 3-8) set forth in the petition. In addition thereto, respondent would urge the Court to consider the following regarding the questions raised in the petition:

Venue.

Venue was originally designated in Burlington County, New Jersey, on this indictment which was one of the series of seven associated indictments all involving Joseph Zicarelli and Frank Mallamaci as defendants. Venue on the first was laid originally in Hudson County. Venue on the next five to come down (SGJ2-70-8A; SGJ2-70-8B; SGJ2-70-8C; SGJ2-70-8D; and SGJ2-70-8E) was originally laid in Mercer County.

Upon application of the State, venue on SGJ269-2 was changed to Mercer County. That application was supported by

the verified petition of the codirector of the Organized Crime and Special Prosecutions Section of the Division of Criminal Justice. It recited that subsequent to the return of SGJ2-69-2, four other indictments naming Zicarelli and Mallamaci had been returned and allocated to Mercer County; the prosecution of each of these indictments required the testimony of one individual (Policastro), whose personal safety was in extreme danger; this witness was in protective custody and his protection required that he be moved as little as possible and then only to locations where security arrangements could be made in the Mercer County area. The court thereupon reallocated SGC2-69-2 to Mercer County, New Jersey.

The next five indictments, SGJ2-70-8A through 8E, were originally allocated to Mercer. However, the State determined that security arrangements would still be difficult in populous Trenton and would be simpler in less populous though nearby Burlington County. For this reason, the State applied for a reallocation of venue for all of these matters. This was granted.

Judge Kingfield, the assignment judge, designated to preside over the State Grand Jury, in later explaining his actions indicated that the initial designation of Mercer was only intended to be temporary — the bulk of State Grand Jury indictments bear an initial allocation to Mercer where he sits. The reallocation to Burlington was a logical choice because while no courtroom was available in Mercer County, a courtroom and a judge were available in Burlington.

Petitioner sought to challenge the allocation of venue and was granted a hearing before Judge Van Sciver who was to try these cases. The court denied the motion to change the venue. Petitioner then sought leave to appeal first in the Appellate Division, which was denied, and then in the Supreme Court of New Jersey.

The New Jersey Supreme Court remanded the matter for a hearing because they felt Judge Van Sciver erred in indicating that he felt bound by Judge Kindfield's prior order. On the remand to Judge Kingfield on March 9, 1971, the judge agreed with the conclusion of defense counsel, Mr. Newman, that the court was to consider the matter strictly "de novo," unbound by prior decisions.

Petitioner and his codefendants were given a full ,op-

portunity to submit briefs and argue on the matter as if it were coming before the court for the first time on the motion of the State, with the State bearing the burden of persuasion.

In passing on what in effect was a renewed application on the contested motion, the court was principally moved by consideration for the witness Policastro's security. It was also moved by the fact that because various of the defendants involved were public figures and men of considerable influence in Hudson County, a fair trial for all sides would be difficult to achieve in that locale. Finally the court was moved by the failure of defendants to demonstrate any prejudice that would inure to them as a result of being tried in Burlington. Now, after this trial, petitioner still cannot point to a single indication that they were so prejudiced.

Summary Of Jury Selection.

Petitioner takes issue with the sufficiency of the court's voir dire of prospective jurors contending that it failed to pose a direct inquiry as to prospective jurors' exposure to pretrial publicity regarding the case. He argues that such inquiry was necessary in order that he might exercise his peremptory challenges effectively.

After the fifteenth prospective juror called (one had already been excused) was placed in the jury box, the court asked the panel—

> "if any of you jurors who presently occupy the jury box had any occasion to read, hear, see or discuss with anyone the case at hand and the personalities allegedly identified therewith, or expressed an opinion with respect to the merits of the case at hand?" (1T33-9 to 14).

Several jurors responded to the inquiry by raising their hands. The court proceeded to explore with each one the nature of their exposure to pretrial publicity. (1T34-9 to 1T37-11). The record discloses that following this, the voir dire of every other prospective juror which progressed past preliminary questions contained an inquiry, at least by reference, to the matter of exposure to pretrial publicity. Typically, the court's inquiry was a variation on the following:

"THE COURT: You have heard the questions that I have posed to them thus far?
JUROR: Yes.

THE COURT: If I were to address all of those matters to you individually, is there anything in any of your answers to those questions or the subject matter of those questions, that would bring answers that we should discuss with you, having in mind that we have concern about your ability to be a completely fair and impartial juror?"
(1T39-16 to 1T40-1).

Continuing:

"THE COURT: In the question of reading, hearing seeing or discussing with persons anything related to the alleged facts of this case, or the merits or expression or opinion with respect to this case, is there anything as it relates to you that would indicate an experience of yours of that nature?"
(1T40-18 to 24).

During the first day of trial, the court made this form of inquiry on approximately 45 occasions. Several prospective jurors responded by detailing the nature of their exposure to pretrial publicity, with particular reference to the media through which they had been exposed; *e.g.* 1T83-24 to 84-1; 1T93-1 to 3; 1T94-17 to 18; continuing into the afternoon session, 1T108-5 to 8; 1T109-22 to 25; 1T128-4 to 6; 1T129-16 to 18; 1T134-1 to 11; 1T136-21 to 24; 1T143-15 to 16; 1T148-6 to 7. While responding to the inquiry affirmatively as to exposure to pretrial publicity, certain prospective jurors coupled this response with a declaration of impartiality, *e.g.*, ". . . I read three different newspaper articles on this trial, but I feel I have an open mind at the present time." (1T134-1 to 3). "I read about it . . ., but I feel I can serve and be impartial." (1T136-21 to 24).

On the second day of jury selection the court continued to make general inquiries of every prospective juror. Such inquiries evoked responses as to the individual's exposure to pretrial publicity, as well as attitudes towards gambling and

sequestration. (2T25-3 to 5; 2T41-14 to 16). At one point the court made an extended inquiry of one juror as to "exposure to various media" or "any circumstances which you have come in contact . . ." (2T25-6 to 24.).

After the reserve jury panel was brought in, (2T51-18) the court generally instructed them that, ". . . it is essential that each and all of you hear and digest some material which I give you for consideration." (2T52-12 to 14). The court continued, ". . . the intent of our examination is to determine whether or not there exists any reason why you could not be a fair and impartial juror and discharge your function as a juror in accordance with the oath . . . ." (2T53-12 to 16).

Charles W. Cline, who eventually sat in judgment, was the first juror placed in the box from the reserve panel. (2T56-2). The court posed the following question to Mr. Cline:

> "Having in mind that we readily admit that none of us live or operate in a vacuum, and that we all are exposed to circumstances and media about us, and having in mind also that there may well have appeared in various of the press media certain articles that relate in some fashion to the trial of this case or the personalities involved, is there any experience that you have had with regard to reading, hearing or discussing the merits of this case or expressing our (sic) opinion with respect to the merits of this case?" (2T59-11 to 21).

Cline responded in the negative.

The next prospective juror on the reserve panel was asked by the court:

> "Did you hear the material that I reviewed following your entry into the court room with the jury panel, . . . the material I have reviewed with Mr. Cline, for consideration?" (2T62-10 to 15).

Two more prospective jurors were asked the general question by the court in reference to materials it had reviewed. The third

prospective juror called after Mr. Cline was Edward Bart who also sat on the final jury. Bart was also asked the general question as to materials and subject matter the court had reviewed with prospective jurors. In response, Bart brought to the attention of the court the fact that "he favored gambling." (2T67-14 to 24).

At this point, Mr. Querques, on behalf of defendant Zicarelli, joined by other defense counsel, indicated a tentative conclusion that the jury as constituted was satisfactory. However, he stated to the court that his notes did not indicated any of them had been asked a question as to whether or not, ". . . they have read anything (about the case) . . ." He asked that a further question be posed by the court in that connection. (2T69-13 to 70-73). To this the prosecutor responded, "It seems to me that you have made it clear with the new supplementary panel that has been brought in as to matters of publication. And, this panel that is now in the box — that is those twelve of them — were left over from the original panel that were here during the time that you spoke with the supplementary panel." (2T70-15 to 21). The court declined to grant defense counsel's request. (2T74-12 to 13).

Following this, additional prospective jurors were called. Robert Tims, who sat on the case, was asked the general question to which he responded negatively. (2T80-13 to 81-2). Likewise, jurors Smith (2T102-12 to 20), and Coe (2T127-6 to 12), who eventually sat on the case responded negatively. However, in the course of the *voir dire*, the viability of a court's prior discussions and examination as to exposure to pretrial publicity was indicated by positive responses of prospective jurors, *e.g.*, 2T99-19 to 21; 2T107-2 to 3.

After the State indicated the panel was acceptable to it, Mr. Querques renewed his request to the court for a further question as to whether or not members of the panel had read newspaper articles or heard broadcasts, etc., relating to the case. (2T128-13 to 129-9). The court denied the request. (2T134-4 to 5).

REASONS FOR DENYING THE WRIT

POINT I

THERE IS NO CONSTITUTIONAL RIGHT TO BE TRIED IN THE "COUNTY" IN CONTRAST TO THE "(FEDERAL JUDICIAL) DISTRICT," WHEREIN THE CRIME WAS COMMITTED.

The New Jersey Supreme Court in *State v. DiPaolo*, 34 *N.J.* 279 (1961), *ert.* den. 368 *U.S.* 880 (1961), declared that, "In light of both the history and the reason for the guarantee, we cannot fairly assume the constitution intended to imbed a rule of venue." *DiPaolo, supra*, 34 *N.J.* at 286. The court also stated there, " . . . we are satisfied that the Constitution does not embody the common law rule of venue." *Id.* at 287. Petitioner however, argues that recent cases indicate that the Sixth Amendment, which must now be found to bind the states, commands a different conclusion. The Sixth Amendment provides in part that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and *district* wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (emphasis supplied).

From the broad proposition that this language binds the states as well, with which respondent does not take issue, petitioner asks this Court to find that in the context of a State prosecution, the term "district" must be equated to "county" if that is how local subdivisions are reckoned in a state; and an accused must therefore have the right to a trial in the county wherein the crime was committed. The argument is sophistical.

Assuming that there is a Sixth Amendment "venue" requirement, it should be noted that in every other case where a procedural guarantee of the Bill of Rights has been translated to a State proceeding, the intention and effect have been only to insure conceptual and practical parity to the State court defendant. This process has generally presented no particular practical

or intellectual problem in terms of what was contemplated by the Court for the federal practice could be carbon copied.

The venue concept is somewhat unique in that its efficacy is premised on certain assumptions regarding geography as it relates to trial fairness, which is the basis for the "district" limitation. States are only divided into "districts" in the federal system and the place of defendant's trial is thus confined to these large, well defined geographical areas forming a part of the state, or the whole state where that state, like New Jersey, covers a small geographical area. In the absence of any unit in the State judicial system being denominated a "district," petitioner reasons that, perhaps because of some constitutionally implicit notion of symmetry or some idea that the Constitution requires the maintenance of state judicial systems as microcosms of the federal system, that "district" must be equated to "county."

Apart from the obvious infirmity of this reasoning viewed as an exercise in logic, political science, or semantics, it should be noted that its acceptance would lead to a particularly anomalous result: only as to the venue which must rank among the most denigrated and oft-forsaken procedural requirements of the criminal process, the accused would enjoy a right of much greater dimension and specificity on a state level than in the federal system if the particular state happened to have established political subdivisions smaller than federal districts. Such a greater right would serve no practical end. On the other hand, if the state chose not to provide a separate court for every county (in Texas for instance there are over 500 counties) by petitioner's lights it would seem than an accused could claim immunity from any trial at all if there were no court in the county where the crime occurred.

It is respectfully suggested that the Constitution does not command such absurdity. If it dictates anything as to venue, it is only that a state defendant have the right to be tried within the confines of no larger an area than he would if his offense were federal. In other words, the inquiry must be, if the matter were to be removed to a federal court, where could defendant be tried consistent with the Sixth Amendment? The latter question was the one posed by the only court found to have considered the issue raised as to the meaning of "district" language. *State of Maryland v. Brown*, 295 *F. Supp.* 63, 82 (D.Md. 1969). In New Jersey,

removal would result in a defendant enjoying the right to be tried in the "federal district of New Jersey" which encompasses the whole state. Thus, on a federal level in New Jersey, the meaning of the "district" language is academic. In order to grant the defendant the same practical right in a State court as in a federal court, a determination of which "district" he should be tried in, or what in fact "district" means, would likewise be irrelevant. Any other conclusion, *i.e.*, that urged by petitioner, would be untenable. Or, as Judge Kingfield concluded, for purposes of the State Grand Jury, the State is one "district."

It is respectfully urged that the scholarly discussion by the court in the *Brown* case should lay to rest any historical question in this area. The gloss defendants have given their contentions can not serve to obscure what common sense rejects. See especially *Brown, supra,* 295 *F. Supp.* at 78-82.

POINT II

DUE PROCESS OF LAW WAS NOT VIOLATED BY THE DESIGNATION OF VENUE HERE.

There is recent authority on the question which holds that nothing in the Constitution limits a state court, at the behest of the prosecution, in changing the venue of trial for "good cause shown" over defendants' objection. *Brown, supra* at 82.

But in any event, it is clear that in remanding the venue question to Judge Kingfield for a hearing *de novo,* it was the belief of the Supreme Court that any basis for complaint resulting from the *ex parte* nature of the initial allocation of venue in the companion cases to this one, would be thereby rectified. Assuming the basis for the initial allocation of the instant case can be traced from the *ex parte* application, it is clear that petitioner upon remand was afforded the sort of full and fair hearing that would be mandated if due process so required, Judge Kingfield's decision clearly reflects that he reevaluated all of defendants' arguments, not as if they bore the risk of non-persuasion, but rather as if the whole matter were coming to him for the first time. His reasons for selecting Burlington were laid out fully on the record and were clearly substantial.

Moreover, in the absence of any showing that the court's designation of venue would or in fact did prejudice petitioner's trial rights, it is respectfully submitted that any alleged shortcomings in the manner of that designation need not concern this Court.

POINT III

ZICCARELLI'S FOURTH AND SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE INTRODUCTION OF HIS CONVERSATION WITH POLICASTRO.

The extension of *Massiah v. United States*, 377 *U.S.* 201 (1964) sought vy Zicarelli as to incriminating statements elicited by an undercover agent while defendant was already under indictment for an unrelated crime, was considered and rejected by this Court in *Hoffa v. United States*, 385 *U.S.* 293, 304-310 (1966). In *Hoffa*, the situation was excacerbated because the defendant was not only under indictment but on trial on the earlier charge.

POINT IV

THE EXAMINATION OF PROSPECTIVE JURORS INCORPORATED THE INQUIRY PETITIONER CLAIMS WAS NECESSARY FOR AN EFFECTIVE EXERCISE OF HIS PEREMPTORY CHALLENGES.

Petitioner seeks to raise interesting questions regarding the sufficiency of a *voir dire* examination where the possibility of prejudicial pretrial publicity exists. However, treatment of those questions must await another case. Analysis of the record of the pretrial *voir dire* reveals that an inquiry of the character petitioner urges was necessary to make effective use of the peremptory challenge where pretrial publicity is a concern, was in fact made of all of the individuals who eventually sat on the jury.

As set forth in the "Counter-Statement of the Case" when for the first time fourteen persons were seated in the box, the court put to them a question calling for each one to disclose any form of pretrial publicity dicussions or experiences to which they had been exposed relating to the case. To this inquiry, several persons responded and were questioned as to the nature of their exposure. (1T33-9 to 37-11). The court's examination of every other prospective juror the first day included a reference to this inquiry and demanded a response to it. That such was understood as being sought was indicated by the number of prospective jurors who alerted the court to their exposure, usually gratuitously coupled with either a disclaimer of being affected, or a confession of having a predetermined idea as to guilt or innocence. (E.g., 1T134-1 to 3; 136-21 to 24).

On the second day, the court continued to make the same form of inquiry to members of the initial panel. At one point the court asked one individual about any exposure to communications media relating to the trial. (2T25-6). That prospective jurors on the second day were still aware that the court sought information as to exposure and attitudes regarding gambling is an indication that the general question had continued efficacy in this connection. (2T25-3 to 5; 41-14 to 16). Thus, as to the jurors chosen from the initial panel, it is clear that all were subjected to examination as to whether they had been exposed to pretrial publicity.

Petitioner's contentions regarding the sufficiency of the *voir dire* seems to emanate from the reflection of his trial counsel, Mr. Querques, who stated that his notes did not indicate that the jurors seated had been asked a question as to whether "they have read anything (about the case)." (2T69-13 to 70-12). As petitioner now concedes, all of those from the first panel had been asked this.

Examination of the record reveals that petitioner's counsel's supposition was incorrect as to members of the reserve panel; on the other hand, the prosecution was correct in insisting that the members of the new panel had in fact been queried as to "matters of publication." (2T70-15 to 21).

First it should be noted that juror Cline who sat on the case was the first person drawn from the new reserve panel. (2T56-2). As set forth in the "Counter-Statement of the Case," the court in very direct fashion asked him in the presence of the rest of the panel not only whether he had read anything in the press, or been exposed to anything else in other media relating to the trial, but also whether he had any "experience" including exposure to any sort of discussion or airing of opinion relating to the case. (2T59-11 to 21).

The next prospective juror was pointedly asked whether he heard the materials reviewed with Cline by the court. (2T60-10 to 14). Edward Bart, who also sat on the final panel, was the second person to follow the man who was asked this question and his response to general questions indicated an awareness of what was required to be disclosed. He indicated he favored gambling. (2T67-14 to 24).

The other three jurors chosen from the reserve panel: Tims (2T80-13 to 81-2); Smith (2T103-12 to 20); and Coe (2T127-6 to 12), were asked the same question and responded negatively. However, their examination was in close proximity to that of persons responding by admitting exposure to publicity. (2T99-19 to 21; 107-2 to 3).

Thus, it appears that counsel was mistaken in maintaining that members of the jury were not forced to respond to a direct inquiry as to exposure to publicity. Moreover, it is submitted that even if it had not been so, the question which petitioner acknowledges was asked would have been sufficient under the circumstances to elicit the information sought. The responses of persons to publicity inquiries indicated an understanding that their duty was to disclose exposure and let the court determine its

effect on impartiality, irrespective of whether the prospective juror felt prejudiced thereby.

In light of record of the *voir dire*, it is submitted that it did not suffer from the infirmity alleged by petitioner and this Court need not concern itself with petitioner's legal contentions in this connection.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that the Petition for Certiorari to the New Jersey Superior Court, Appellate Division, not issue.

Respectfully submitted,
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ATTORNEY GENERAL OF NEW JERSEY

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Of Cpunsel and on the Brief

COPY

In The

Supreme Court of the United States

October Term, 1972

SEP 21 1973

No. 73-195

JOSEPH ZICARELLI,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

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SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONER

To the Honorable, The Chief Justice
And the Associate Justices of the
Supreme Court of the United States

This supplemental brief is submitted by petitioner pursuant to Rule 24(5) of the Rules of the Supreme Court in order to bring to the Court's attention a highly significant decision officially reported since the filing of the petition in this case.

On June 5, 1973 the Supreme Court of California decided *People v. Jones*, 108 Cal. Rptr. 345, 510 P.2d 705 (Sup. Ct. 1973). That decision was reported in 13 Cr. L. Rptr. 2293 on July 4, 1973.

In the *Jones* case the defendant had argued that the Sixth Amendment to the United States Constitution entitled him to a jury drawn from the judicial district in California wherein the crime with which he was charged was alleged to have been committed. The defendant there had been tried and convicted in a judicial district other than where the crime was committed by a jury none of whose members were drawn from the district of the crime.

Relying upon this Court's decisions in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed. 2d 446 (1970) and *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972), the court found it "abundantly clear that the vicinage requirement as stated in the Sixth Amendment, namely trial by a jury of the district wherein the crime shall have been committed, is an essential feature of jury trial preserved though changed by the Sixth Amendment and made binding upon the states by the Fourteenth Amendment." 510 P. 2d at 709. The court went on to state:

> "Therefore a criminal defendant in a state criminal prosecution has a constitutional right to be tried by a jury drawn from, and comprising a representative cross-section of, the residents of the district wherein the crime shall have been committed." 510 P. 2d at 709.

Concluding the opinion the court once again reemphasized and restated its holding as follows:

> "To recapitulate, we hold that the Sixth and Fourteenth Amendments to the United States Constitution as interpreted in *Williams* and *Peters*, guarantee a criminal defendant in a state trial the right to be tried by an impartial jury comprising a representative cross section of, and selected from residents of, the judicial district where the crime was committed." 510 P. 2d at 712.

The landmark decision in *People v. Jones, supra,* strongly reinforces the position advanced by petitioner in the first point of his petition. As with the defendant in *Jones,* petitioner was tried in a remote judicial district* from the locale of the crime. Indeed, a comparison with *Jones* will reveal that petitioner's trial was much further from the scene of the crime than was the situation in *Jones* where the trial was *in the same county* but in another district of the state judicial system. Petitioner was tried in and with jurors drawn from "remote, rural Burlington County, far removed from the urban Hudson County locale of the crimes charged " (Petitioner's petition, p. 11).

The decision in petitioner's case now stands opposed to that of one of our most prestigious state courts. In addition, the court in *Jones* also found it necessary to grapple with the decision in *Maryland v. Brown,* 295 F.Supp. 63 (D. Md. 1969), relied upon by the court below and discussed in petitioner's petition. That the questions involved are momentous and should be resolved by this court is made clear by the 4-3 split among the California Supreme Court in *People v. Jones, supra.*

CONCLUSION

For these reasons as well as the reasons set forth in the petition, it is urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner

*In New Jersey the county is the only designated judicial district.